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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RAYMOND FOREMAN, Plaintiff and Respondent, v. CENTINELA SKILLED NURSING AND WELLNESS CENTRE WEST, LLC et al., Defendants and Appellants.	B284869 (Los Angeles County Super. Ct. No. BC560144)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Glaser Weil Fink Howard Avchen & Shapiro, Patricia L. Glaser, Rory S. Miller and David Zarmi for Defendants and Appellants.

Garcia, Artigliere & Medby, Stephen M. Garcia and David M. Medby for Plaintiff and Respondent.

Plaintiff Raymond Foreman (Foreman) filed this action for damages based on elder abuse, negligence, and negligent hiring and supervision. Defendants Centinela Skilled Nursing and Wellness Centre West, LLC and its parent company, Brius, LLC, (collectively Centinela)[1] filed a motion to compel arbitration. The trial court denied the motion. Centinela and Brius appeal. We affirm.

BACKGROUND

On October 9, 2014, Foreman filed this action through his daughter, La Tonya Foreman (La Tonya), under a durable power of attorney. The complaint alleges that Foreman was admitted to Centinela's skilled nursing facility in March 2014 because he lacked the ability to care for himself due to dementia and other health problems. Due to Centinela's negligence, Foreman fell and broke his leg in September 2014. Centinela failed to provide any treatment for the broken leg, failed to provide adequate pain medication, and failed to notify his family of his injury. Once La Tonya insisted on an x-ray and the breaks were discovered, Foreman was taken to Centinela Hospital Medical Center, where a cast was placed on his leg.

On July 7, 2017, Centinela filed its motion to compel arbitration. In support of its motion, Centinela submitted documents from a class action lawsuit in which Foreman was one of the named plaintiffs and Centinela one of the named

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[1] Centinela is not part of Centinela Hospital Medical Center.

defendants. (*Foreman v. Rechnitz* (Super.Ct. L.A. County, No. BC559909).) One of the documents was a "resident-facility" arbitration agreement, expressing an understanding "that any dispute between the parties . . . and/or any disputes about the validity, interpretation, construction, performance, and enforcement of this Agreement, will be determined by submission to individual arbitration and not by lawsuit or resort to court process." It also specified that "[a]n agreement to arbitrate is not a precondition for medical treatment or for admission to the Facility." La Tonya signed this agreement on March 14, 2014 as Foreman's representative, "represent[ing] that the Resident, in words or actions, expressly authorized the undersigned to agree to" the terms of the arbitration agreement.

According to the declaration of Centinela's employee who oversaw admissions to the facility, "Foreman was aware that [La Tonya] was signing document on his behalf and never raised any objection with Centinela." La Tonya stated in her deposition that Foreman agreed to move into the Centinela facility to get treatment. When asked if he had agreed to let La Tonya fill out the paperwork for him, she reasoned, "Well, he really didn't know that I was going—we had to do that much paperwork at the office. When he was actually signed in, he wasn't aware of it. . . ." He understood that La Tonya was filling it out for him. The way she knew it was "okay for [La Tonya] to do the paperwork for him" was that Centinela called her and asked her to do it. He never told La Tonya not to fill out the paperwork for him. As far

as she knew, he told Centinela to deal with La Tonya regarding his health care.[2]

Foreman opposed the motion on the ground of res judicata. In support of his opposition, Foreman submitted evidence that on October 8, 2015, the trial court in the class action granted Centinela's motion to compel arbitration as to one of the named plaintiffs. It denied the motion as to Foreman and another named plaintiff. In its written order, it explained that it had held an evidentiary hearing on the motion. It denied the motion as to Foreman because Centinela "failed to establish [the] formation of a contract with Mr. Foreman based on the March 14, 2014 arbitration agreement." Additionally, La Tonya established that Foreman "lacked capacity to sign an arbitration agreement when he was admitted to the" facility again in January 2015 and La Tonya "properly rescinded that agreement the next day."

In particular, the court found Centinela's employee was not present when La Tonya signed the March 14, 2014 arbitration agreement and had no way of knowing whether or not Foreman objected to La Tonya signing the agreement. The undisputed evidence was that Foreman was not present when La Tonya signed the agreement. There was no evidence Foreman had read or understood the agreement. The court also found that Centinela failed to demonstrate that La Tonya had actual or ostensible agency to act for Foreman when she signed the March 14, 2014 agreement.

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[2] There was an objection that the question whether, as far as La Tonya knew, Foreman told Centinela to deal with La Tonya regarding his health care was vague, ambiguous as to time, called for speculation, and was leading.

While Foreman personally initialed a new arbitration agreement on January 13, 2015, the employee who was present did not evaluate his mental capacity at the time. By that time, he was engaged in the class action litigation and, on September 25, 2014, he had executed a durable power of attorney in La Tonya's favor. When La Tonya went to the facility to sign the admission papers, she refused to sign another arbitration agreement. Additionally, by that time Foreman lacked the capacity to enter into the agreement.

In the instant case, following a hearing the trial court denied the motion to compel arbitration. No statement of decision was requested or prepared. Centinela appealed.

DISCUSSION

I. Standard of Review

The parties disagree on the appropriate standard of review. Centinela claims review is de novo. Foreman claims the substantial evidence rule applies. Both standards apply, depending on the issues involved.

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425; accord, *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 839-840.)

Additionally, Code of Civil Procedure section 1291 "requires a statement of decision for any ruling denying a motion to compel arbitration if a party requests one. [Citations.]" (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970.) Conversely, the trial court is not required to issue a statement of decision if the parties do not request one. (*Ibid*.; accord, *ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 900.)

However, "[a] party's failure to request a statement of decision when one is available has two consequences. First, the party waives any objection to the trial court's failure to make all findings necessary to support its decision. Second, the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence. [Citations.] This doctrine 'is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.' [Citation.]" (*Acquire II, Ltd. v. Colton Real Estate Group*, *supra*, 213 Cal.App.4th at p. 970; accord, *ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP*, *supra*, 9 Cal.App.5th at pp. 900-901.)

Under the substantial evidence standard, we view the evidence in the light most favorable to the trial court's order. (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 497; *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892.) We neither weigh the evidence ourselves nor make credibility determinations because those functions are the province of the trial court. (*Santa Clara County Correctional*

Peace Officers' Assn., Inc. v. County of Santa Clara (2014) 224 Cal.App.4th 1016, 1027; *Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1031.)

II. Res Judicata

Centinela contends that res judicata does not apply to bar relitigation of the question whether there was an arbitration agreement in place between itself and Foreman, relying on *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758. Foreman asserts that *Phillips* is inapposite and res judicata applies.

In *Phillips*, the defendant brought a motion to compel arbitration, which the trial court denied. Following a decision by the United States Supreme Court in a similar case, the defendant renewed its motion to compel arbitration based on a change in the law. The plaintiff opposed the motion, arguing that res judicata barred relitigation of the enforceability of the arbitration agreement. The trial court granted the motion. (*Phillips v. Sprint PCS*, *supra*, 209 Cal.App.4th at pp. 764-765.)

On appeal, the court reviewed the principles of res judicata: " ' "As generally understood, '[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.' [Citation.] The doctrine 'has a double aspect.' [Citation.] 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]' [Citation.] 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment . . . "operates" ' in 'a second suit . . . based on a different cause of action . . . "as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and

determined in the first action." [Citation.]' [Citation.] 'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.' " ' [Citation.]" (*Phillips v. Sprint PCS*, *supra*, 209 Cal.App.4th at pp. 769-770.)

The plaintiff contended "the original order denying arbitration was in essence a judgment in a prior special proceeding that bar[red the defendant] from relitigating the arbitrability of the parties' dispute in a subsequent proceeding." (*Phillips v. Sprint PCS*, *supra*, 209 Cal.App.4th at p. 770.) The trial court agreed with the defendant "that the arbitrability issue was raised and renewed by motion in a single ongoing class action lawsuit, making res judicata principles inapplicable because there is no prior judgment." (*Ibid*.) The court explained that "[t]he original order denying arbitration was not a judgment in a prior proceeding. 'Res judicata gives conclusive effect to a former judgment only when the former judgment was in a different action; an earlier ruling in the same action cannot be res judicata, although it may be "law of the case" if an appellate court has determined the issue.' [Citation.]" (*Ibid*., fn. omitted.) The original order at issue was in the same action in the same court. Thus, res judicata did not apply. (*Id*. at pp. 772-773.)

The *Phillips* court distinguished *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, on which Foreman relies. *Otay River Constructors* "arose out of an independent action 'brought solely to compel arbitration of

contractual disputes,' not a motion to compel arbitration in a pending action. (*Id*. at p. 799.) The court there held that a party who obtained an order denying a petition to compel arbitration in the independent action had 'obtained a " 'simple, unqualified win' " on the only contract claim at issue in the action' and was thus entitled to contractual attorney fees as the prevailing party." (*Phillips v. Sprint PCS*, *supra*, 209 Cal.App.4th at p. 772, fn. omitted.) A motion to compel arbitration brought in a pending action, as was the case in *Phillips*, was "not a separate proceeding giving rise to a fee award" and similarly not "a prior proceeding resulting in a final judgment on the merits that is entitled to res judicata effect." (*Id*. at pp. 772-773.)

Lounge-A-Round v. GCM Mills, Inc. (1980) 109 Cal.App.3d 190, on which *Otay River Constructors* relied, involved a petition to compel arbitration in federal district court. The parties stipulated to withdrawal of the petition with prejudice. (*Lounge-A-Round*, *supra*, at p. 199.) In the subsequent state court action, the trial court rejected the defendant's contention "that the instant action is not precluded by the doctrine of res judicata." (*Id*. at p. 198.)

Wilder v. Whittaker Corp. (1985) 169 Cal.App.3d 969 cited *Lounge-A-Round* in connection with the statement in *Towers, Perrin, Forster & Crosby, Inc. v. Brown* (3d Cir. 1984) 732 F.2d 345 "that no California decision 'has determined whether an order denying arbitration is entitled to preclusive effect in subsequent proceedings.' (732 F.2d at p. 348, but see *Lounge-A-Round v. GCM Mills, Inc.*, *supra*, 109 Cal.App.3d 190, 198-199.) The [*Towers*] court predicted that the California Supreme Court would hold that the order in that case was a final order, and that res judicata applied, because (1) '[w]hat little case law there is on

point indicates that the decision that a dispute is or is not arbitrable is conclusive of that issue[]' (732 F.2d at p. 348), (2) an order denying arbitration 'meets the standard of finality for res judicata that the judgment be "free from attack on appeal," ' (*id.*, at p. 349) i.e., the order, having been upheld on direct appeal, 'could not be reviewed again on appeal from a determination of the merits of the dispute' (*ibid.*), and (3) the 'one final judgment' rule does not preclude the order from being res judicata. 'There were essentially two separate actions in the California trial court: [the] special proceeding to compel arbitration, and [a separate] action for declaratory judgment and damages' (*ibid.*), and the finality of the order denying arbitration 'is not undermined by the fact that the outcome of the dispute itself must be resolved by a separate action,' whether the order be considered a final judgment or an interlocutory order. (*Ibid.*)" (*Wilder*, *supra*, at pp. 973-974, fn. omitted.) *Wilder*, similar to *Phillips*, involved two petitions filed in a single action however, indicating that the law of the case doctrine applied. (*Id.* at p. 974.)

It would appear that an order denying a motion to compel arbitration in an independent action is res judicata as to issues that " ' " ' "were actually litigated and determined" ' " ' " in that action (*Phillips v. Sprint PCS*, *supra*, 209 Cal.App.4th at p. 770). Here, however, the motion to compel arbitration was brought in a pending action, and there is nothing in the record to indicate that there was a final judgment as to Foreman in that action. The order denying the motion to compel arbitration as to Foreman does not "meet[] the standard of finality for res judicata that the judgment be 'free from attack on appeal.' [Citation.]" (*Towers,*

Perrin, Forster & Crosby, Inc. v. Brown, *supra*, 732 F.2d at p. 349.)[3] Therefore, res judicata does not apply.

III. Whether the Trial Court Erred in Denying the Motion To Compel Arbitration

In determining whether the trial court erred in denying Centinela's motion to compel arbitration, we are faced with two questions. One is whether substantial evidence supports the trial court's implied findings supporting a conclusion that the arbitration agreement is not enforceable against Foreman. The other is whether, as a matter of law, the trial court erred in resolving the issue rather than finding the validity and enforceability of the agreement were questions for the arbitrator.

As to the first question, as Foreman points out, Centinela does not address the issue. Foreman suggests this is because Centinela knows it "cannot possibly prevail under that standard." Whatever Centinela's motivation, we agree that there is substantial evidence to support a finding that Foreman did not agree to arbitration, and at the time La Tonya signed the arbitration agreement on his behalf, she was not authorized to do so. For the same reasons the court in the class action denied the motion to compel arbitration as to Foreman, the trial court here

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[3] An argument might have been made that the order denying the motion to compel arbitration in the class action should be given collateral estoppel effect (see *Phillips v. Sprint PCS*, *supra*, 209 Cal.App.4th at p. 770), but Foreman did not make that argument in the trial court, and it is thus forfeited. (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 332.)

could have reached the same conclusions and denied Centinela's motion on that basis.

This brings us to the second question. As stated above, the arbitration agreement provided that "any dispute between the parties . . . and/or any disputes about the validity, interpretation, construction, performance, and enforcement of this Agreement, will be determined by submission to individual arbitration and not by lawsuit or resort to court process." Centinela contends the question whether Foreman was bound by the arbitration agreement was to be decided by the arbitrator, not the trial court.

Centinela relies on principles addressing the question whether the parties agreed to arbitrate particular disputes. The cases it cites in support of these principles also indicate that the trial court has a role in determining whether the parties should be compelled to submit to arbitration.

In *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, the court explained: " 'California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration.' [Citation.] It is the party opposing arbitration who bears the burden to show the arbitration provision cannot be interpreted to cover the claims in the complaint. [Citations.] There is no public policy, however, that favors the arbitration of disputes the parties did not agree to arbitrate. [Citation.] [¶] 'When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.' [Citation.]" (*Id.* at p. 890.)

In *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, the court explained it this way:

" 'Arbitration is . . . a matter of contract, and the parties may freely delineate the area of its application. The court's role . . . must be strictly limited to a determination of whether the party resisting arbitration agreed to arbitrate. A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted "unless it may be said with positive assurance that the arbitration [provision] is not susceptible of an interpretation that covers the asserted dispute." ' [Citations.]" (*Id*. at p. 771.)

However, "[a]s to the question of whether there was a contract to arbitrate in the first instance, despite a strong . . . policy in favor of arbitration, 'arbitration is a matter of contract and the parties cannot be forced to arbitrate something to which they did not agree.' [Citations.]" (*Lounge-A-Round v. GCM Mills, Inc.*, *supra*, 109 Cal.App.3d at p. 195.) Code of Civil Procedure section 1281.2 provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists*, unless it determines that" one of the specified conditions exist. (Italics added.) Thus, "the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; accord, *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787; see also *Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1364 ["whether there was an agreement to arbitrate was a

threshold issue that the trial court was required to determine prior to granting the motion to compel arbitration"].)

Here, before the trial court could grant the motion to compel arbitration, it first had to determine whether Centinela and Foreman had a contract containing an agreement to arbitrate. It impliedly found they did not. (*ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP*, *supra*, 9 Cal.App.5th at pp. 900-901; *Acquire II, Ltd. v. Colton Real Estate Group*, *supra*, 213 Cal.App.4th at p. 970.) Substantial evidence supports this finding.

While Centinela's employee stated that Foreman was aware that La Tonya was signing the arbitration agreement on his behalf and never objected, that employee did not present any factual basis for that statement. She did not state that she was present at the time La Tonya signed the agreement; she did not say how she knew Foreman was aware that La Tonya was signing an arbitration agreement on his behalf. She also never stated that Foreman agreed that La Tonya could sign the arbitration agreement on his behalf.

La Tonya never stated in her deposition that Foreman knew she was signing an arbitration agreement on his behalf and agreed to it. In essence, she stated that Centinela asked her to fill out the paperwork for Foreman, she assumed Foreman told Centinela to have her fill out the paperwork, and he never told her not to fill it out. There also was no evidence that La Tonya had actual or ostensible agency to act for Foreman when she signed the arbitration agreement.

In sum, there was no evidence that Foreman ever agreed to have La Tonya sign the arbitration agreement on his behalf, i.e., that he agreed to arbitrate his disputes with Centinela.

Substantial evidence thus supports the trial court's implied finding that Centinela and Foreman did not have an agreement to arbitrate disputes between them. (See *Greening v. General Air-Conditioning Corp.* (1965) 233 Cal.App.2d 545, 550 ["it is quite logical to draw findings in terms of the absence of affirmative proof rather than the presence of negative proof"]; accord, *Heap v. General Motors Corp.* (1977) 66 Cal.App.3d 824, 831-832.) On that basis, the trial court properly denied Centinela's motion to compel arbitration. (Code Civ. Proc., § 1281.2; *Fagelbaum & Heller LLP v. Smylie*, *supra*, 174 Cal.App.4th at p. 1364.)

DISPOSITION

The order is affirmed. Foreman is awarded his costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J. CURREY, J.*

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* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.